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4 BEFORE THE MONTANA STATE AUDITOR
5 AND COMMISSIONER OF INSURANCE AND SECURITIES
6 HELENA, MONTANA

6 IN THE MATTER OF:) Case No. SEC-2008-65
7) I-10-08-08-280

7 DANIEL TWO FEATHERS, aka DAN LATHAM,)
8 aka OAHEYO TWO FEATHERS, individually)
9 and in his capacity as agent for the)
10 named respondent companies; SHAWN)
11 SWOR, individually, and in his)
12 capacity as agent for the named)
13 respondent companies; TLT HOLDINGS)
14 CORPORATION; DTF CONSULTING GROUP)
15 TRUST; DTF CONSULTING GROUP; HARVEST)
16 INVESTMENT HOLDINGS, LTD.; TERRENCE)
17 PAULIN, individually and in his)
18 capacity as an agent for the named)
19 respondent companies; ERIC SCHULTZ,)
20 individually and in his capacity as)
21 the owner agent for BIG SKY EQUITY,)
22 INC. and as an agent for the named)
23 respondent companies, BIG SKY EQUITY,)
24 INC., a Bozeman, Montana investment)
25 company; and ANDRE CURTIS,)
26 individually and in his capacity as an)
27 agent for the named respondent)
28 companies.)

20 THERESA CHABOT, individually and in)
21 her capacity as an unregistered)
22 investment advisor.)

22 GLOBAL HOLDINGS GROUP, LLC)
23 611 8th Avenue North)
24 Surfside Beach, SC 29575)

24 JOHN and JANE DOES 1-5.)

25 Respondents.)
26)

ORDER
(REGARDING TWO FEATHERS
AND SWOR:
(1) RESPONDENTS' RULE
33(a) & 59(g) MOTION
AND
(2) DEPARTMENT'S REQUEST
FOR SUMMARY JUDGMENT AS
A MATTER OF LAW

1 On December 15, 2009, the Securities Division of the Office
2 of the Montana State Auditor and Commissioner of Insurance/
3 Securities (Department) submitted its "Motion and Brief for
4 Summary Judgment for Discovery Abuses Re: Daniel Two Feathers and
5 Shawn Swor." On January 8, 2010, Respondents, Daniel Two
6 Feathers (Two Feathers) and Shawn Swor (Swor) submitted
7 "Respondents' Brief Opposing Summary Judgment." The Department
8 submitted its "Reply to Response Re: Summary Judgment for
9 Discovery Abuses - Daniel Two Feathers and Shawn Swor" on
10 January 25, 2010. Thereafter, on February 24, 2010, the
11 undersigned issued an Order deeming the Department's requests for
12 admission served upon Two Feathers and Swor, respectively as
13 being "conclusively admitted in this contested case matter" and
14 granting partial summary judgment to the Department against Two
15 Feathers and Swor. "[B]ecause these two Respondents identified
16 no genuine issue as to any material fact" and since the
17 Department failed to demonstrate its entitlement to judgment as a
18 matter of law, only "partial" summary judgment was granted.
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21 Subsequently, on March 4, 2010, the Department submitted a
22 "Brief Requesting Summary Judgment Re: Daniel Two Feathers and
23 Shawn Swor." On March 29, 2010, these two Respondents submitted
24 their "Response to Department's Motion and Brief Requesting
25 Summary Judgment Re: Daniel Two Feathers and Shawn Swor." The

1 Department submitted its "Reply Brief Re Summary Judgment Re:
2 Daniel Two Feathers and Shawn Swor" on April 1, 2010.

3 Concomitantly, a "Rule 36(b) Motion to Withdraw Admissions
4 and Rule 59(g) Motion to Alter or Amend Judgment Re: Dan Two
5 Feathers and Shawn Swor" was submitted on March 5, 2010, followed
6 by the Department's submission on March 25, 2010, of its
7 "Response Brief to Motion to Withdraw Admissions and to Alter or
8 Amend Summary Judgment Re: Daniel Two Feathers and Shawn Swor."
9 On April 2, 2010, "Respondents' Reply to Department's Response
10 Brief to Motion to Withdraw Admissions and to Alter or Amend
11 Judgment Re: Daniel Two Feathers and Shawn Swor" was submitted.

12 MOTIONS TO: WITHDRAW ADMISSIONS AND TO ALTER OR AMEND JUDGMENT

13
14 When a party seeks discovery pursuant to Rule 36(a), M. R.
15 Civ. P., a failure to timely respond to requests for admission
16 results in automatic admission of the matters requested, and the
17 rule is self-executing. *F.T.C. v. Medicor LLC*, 217 F. Supp. 2d
18 1048, 1053 (D. Cal. 2002). Respondents seek relief under Rule
19 36(b) of the Montana Rules of Civil Procedure (M. R. Civ. P.)
20 which provides in pertinent part as follows:
21

22 Effect of admission. Any matter admitted under
23 this rule is conclusively established unless the court
24 on motion permits withdrawal or amendment of the
25 admission. Subject to the provisions of Rule 16
26 governing amendment of a pretrial order, the court may
27 permit withdrawal or amendment when the presentation of
28 the merits of the action will be subserved thereby and

1 the party who obtained the admission fails to satisfy
2 the court that withdrawal or amendment will prejudice
3 that party in maintaining the action or defense on the
4 merits.

5 (Emphasis added.) Provided in this rule is a discretionary, two-
6 part test. The burden for the first part resides with the movant
7 and if that burden is carried then the burden for the second part
8 shifts to the party that obtained the admission(s). Therefore,
9 the moving party may seek relief from a deemed admission but must
10 demonstrate to the adjudicator how the presentation of the merits
11 have been subverted. Superimposed on their failure to provide
12 any explanation or argument for their failure to provide timely
13 responses to the Department's admission requests, Respondents
14 likewise have demonstrated nothing in regard to the first prong
15 of the Rule 36(b), M. R. Civ. P. test. Therefore, Respondents
16 have failed to carry their burden, i.e. the initial prong of the
17 two-part test.

18 Respondents alternatively seek an amendment/alteration to
19 the undersigned's February 24, 2010, Order pursuant to Rule 59(g)
20 M. R. Civ. P. contending error when the undersigned "deemed
21 requests for admission without evidence of prejudice to the
22 Department" and "granting partial summary judgement create[d] a
23 manifest injustice by preventing Respondents challenge to the
24 merits of the case." Respondents' Motion, page 5. As discussed
25

1 supra, Respondents have failed to carry their burden by not
2 demonstrating to the adjudicator how the presentation of the
3 merits have been subserved. As a result, the burden has not
4 shifted to the Department so as to require it to satisfy the
5 adjudicator that withdrawal or amendment will prejudice the
6 Department in maintaining the action or defense on the merits.
7 Respondents also have provided no legal support whatsoever for
8 their assertion of the creation of a manifest injustice so as to
9 be entitled to an altering/amending of the Order granting partial
10 summary judgment under Rule 59(g) M. R. Civ. P.
11

12 SUMMARY JUDGEMENT

13 The Department seeks "full" summary judgment in this matter,
14 but in order to do so needs to demonstrate to the adjudicator
15 its entitlement to judgment as a matter of law by connecting the
16 admitted matters (admissions), the allegations in the
17 Department's Complaint, and the law.
18

19 As To Two Feathers:

20 The Department first contends it is entitled to summary
21 judgment as a matter of law based on Two Feathers being deemed to
22 having admitted he is not licensed or registered to sell
23 securities in Montana. Two Feathers' Admission No. 3 supports
24 this contention. The Department next contends Two Feathers
25 offered or sold securities through "his" companies, DTF
26

1 Consulting and TLF Holdings. Although none of the admissions
2 substantiate either of these two entities were Two Feathers' and
3 therefore "his," Two Feathers' Admission No. 4 does support the
4 remaining contention. Section 30-10-201(1), MCA, prohibits a
5 person from transacting business in this state as a broker-dealer
6 or salesperson unless registered to do so. To "transact
7 business" is defined by § 30-10-104(24), MCA, as including the
8 terms "sale," "sell," and "offer." As a result, the Department
9 is entitled to summary judgment as a matter of law as to Two
10 Feathers having violated § 30-10-201(1), MCA.

12 The Department next contends entitlement to summary judgment
13 as a matter of law based on Two Feathers being deemed to having
14 admitted to making material misrepresentations and omissions
15 relative to the offer and sale of a securities "product."
16 Although a "securities product" is not statutorily defined, a
17 "security" is defined at § 30-10-103(22), MCA, and Two Feathers'
18 Admission Nos. 4 and 5 do admit to Two Feathers making material
19 misrepresentations and omissions in the offering and selling of
20 securities, which is prohibited by § 30-10-301(1)(b), MCA.

22 Two Feathers' Admission No. 7 supports the Department's
23 contention that Two Feathers made promises regarding the
24 performance of securities that were untrue, which also
25 constitutes a violation of § 30-10-301(1)(b), MCA. Two Feathers'

1 Admission Nos. 8 and 9 support the Department's contentions that
2 Two Feathers, transferred investment funds to Terrence Paulin
3 that were investment fund dollars from investors other than
4 Paulin, and used investor funds for personal use not related to
5 their investment, each of which constitutes a violation of § 30-
6 10-301(1)(c), MCA.

7
8 Two Feathers' Admission No. 6 substantiates the Department's
9 contention that Two Feathers used investor funds from later
10 investments to pay for investment promises to earlier investors,
11 thus constituting a Ponzi scheme as defined by § 30-10-324(6)(b)
12 and as such is violative of § 30-10-325, MCA.

13 As To Swor:

14 The Department contends entitlement to summary judgment as a
15 matter of law based on Swor being deemed to having admitted he is
16 not licensed or registered to sell securities in Montana. Swor's
17 Admission Nos. 1 and 3 support this contention. The Department
18 next contends Swor offered or sold securities through his
19 affiliation to DTF Consulting. Swor's Admission No. 4 supports
20 this contention. Section 30-10-201(1), MCA, prohibits a person
21 from transacting business in this state as a broker-dealer or
22 salesperson unless registered to do so. To "transact business"
23 is defined by § 30-10-104(24), MCA, as including the terms
24 "sale," "sell," and "offer." As a result, the Department is
25

1 entitled to summary judgment as a matter of law as to Swor having
2 violated § 30-10-201(1), MCA.

3 The Department next contends entitlement to summary judgment
4 as a matter of law based on Swor being deemed to having admitted
5 to making material misrepresentations and omissions relative to
6 the offer and sale of a securities "product." Although a
7 "securities product" is not statutorily defined, "security" is
8 defined at § 30-10-103(22), MCA, and Swor's Admission Nos. 4 and
9 5 do admit Swor made material misrepresentations and omissions in
10 the offering and selling of securities, which is prohibited by §
11 30-10-301(1)(b), MCA. The Department has not demonstrated
12 entitlement to summary judgment as a matter of law regarding its
13 asserted violation of § 30-10-301(1)(c), MCA.

15 Swor's Admission No. 6 substantiates the Department's
16 contention that Swor provided substantial assistance to Two
17 Feathers in order to enable Two Feathers to defraud investors and
18 to conduct a Ponzi scheme as defined by § 30-10-324(6)(b) MCA,
19 and by doing so became a participant in conducting or promoting a
20 Ponzi scheme so as to violate § 30-10-325, MCA, as well as § 30-
21 10-301(1)(c), MCA.

23 Lastly, the Department contends that Swor's Admission No. 2
24 that he "sought funds from a family business in Missouri as part
25 of an advance loan scheme" supports a violation of § 30-10-

1 301(1)(c), MCA, and references as legal support *Securities and*
2 *Exchange Com'n v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100,
3 90 L. Ed. 1245 (1946) for the proposition that case defines
4 "advance fee loans" as being an "investment contract." Although
5 the definition of a "security" in § 30-10-104(22), MCA, does
6 include the term "investment contract," it does not include the
7 phrase "advance fee loan," nor does the case cited by the
8 Department reference or define the phrase. The Department has
9 not demonstrated entitlement to summary judgment as a matter of
10 law regarding its asserted violation of § 30-10-301(1)(b), MCA,
11 because the limited factual content of Swor's Admission No. 2 is
12 simply insufficient to support an analogous comparison of an
13 "advance fee loan" to that case's definition of an "investment
14 contract." In addition, the Department's admission request used
15 the phrase "advance loan" and not advance "fee" loan.
16

17 ORDER


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19 Based on the foregoing, IT IS HEREBY ORDERED:

- 20 1. Respondents' Rule 36(b) M. R. Civ. P. Motion to
21 Withdraw Admissions is denied.
- 22 2. Respondents' Rule 59(g) M. R. Civ. P. Motion to Alter
23 or Amend Judgment is denied.
- 24 3. Coupled with the undersigned's February 24, 2010, Order
25 in this matter granting partial summary judgment to the

26 ORDER (REGARDING TWO FEATHERS AND SWOR: (1) RESPONDENTS' RULE 33(A) & 59(G)
27 MOTION AND (2) DEPARTMENT'S REQUEST FOR SUMMARY JUDGMENT AS A MATTER OF LAW - 9
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1 Department as to there not being identified any issue of material
2 fact, the Department's subsequent, supplementary request that it
3 is entitled to summary judgment as a matter of law is granted as
4 delineated herein.

5 Dated this 10th day of June, 2010.

6
7 
8 Michael J. Rieley, Hearing Examiner

9
10 CERTIFICATE OF SERVICE

11 I do hereby certify I served a copy of the foregoing Order
12 (Regarding Two Feathers and Swor: (1) Respondent's Rule 33(a) &
13 59(g) Motion and (2) Department's Request for Summary Judgment as
14 a Matter of Law on all parties of record on the 10th day of June,
2010, by mailing, e-mailing, faxing, or hand delivering a copy
thereof to:

15 Ms. Roberta Cross Guns
16 Special Assistant Attorney
17 General
18 State Auditor's Office
19 840 Helena Avenue
20 Helena, MT 59601

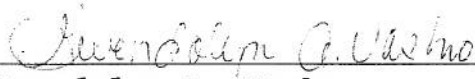
21 Ms. Teresa Chabot
22 P.O. Box 4514
23 Whitefish, MT 59801

24 Mr. Bradley L. Aklestad
25 Attorney at Law
26 P.O. Box 987
27 Shelby, MT 59474

Mr. Andre' Curtis
Harvest Investment Holdings
International
"Carmel" 61 King Street
Hamilton HM19, Bermuda

Mr. Terrence Paulin
13506 Summerport Village
Parkway
Windmere, FL 34786

Global Holdings Group LLC
c/o M. Mark McAdams, Agent
P.O. Box 71150
Myrtle Beach, SC 29572

28 
Gwendolyn A. Vashro